Tribal Consultation and Cultural Heritage

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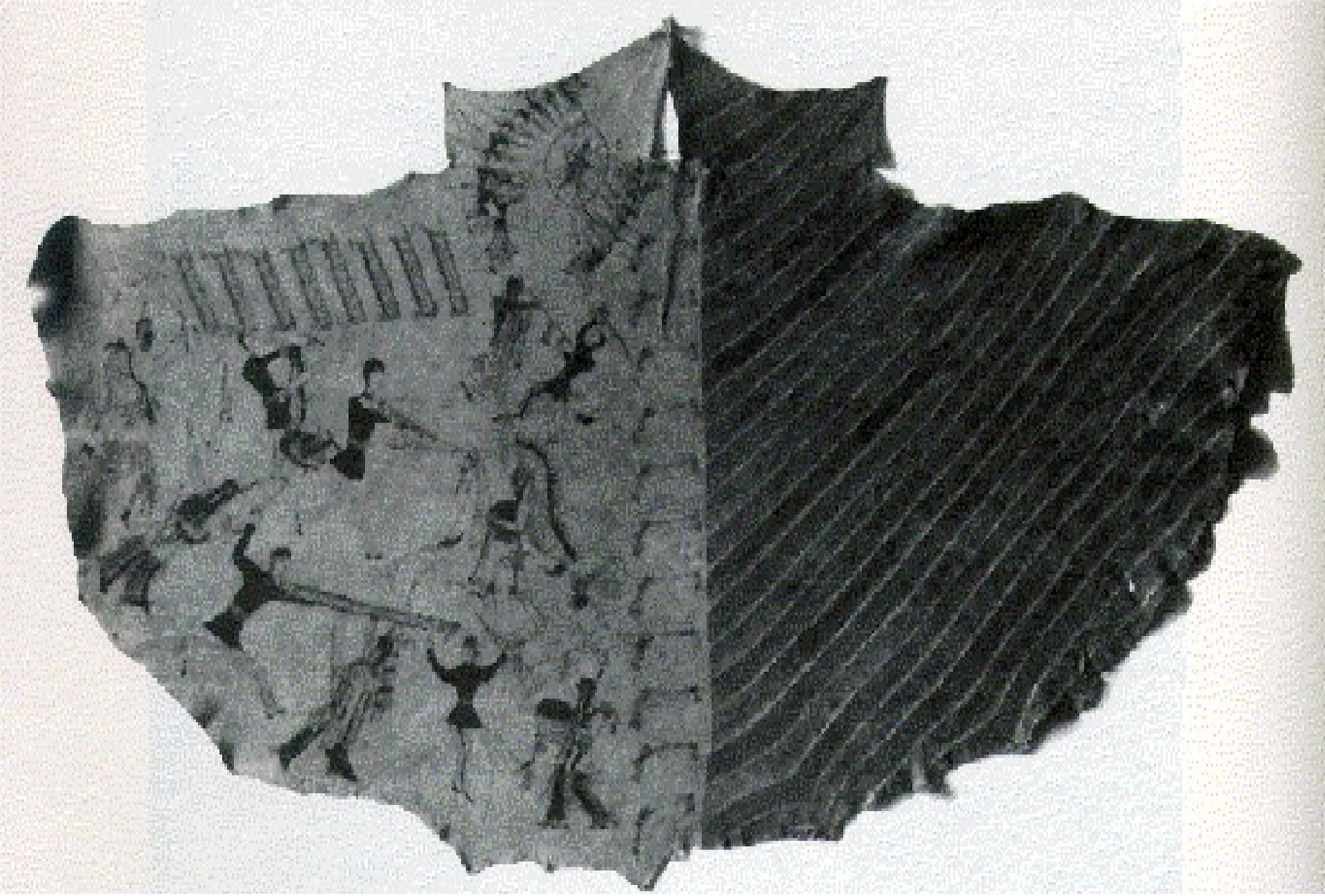
Guiding Principles of Tribal Consultation

- Tribal Sovereignty
- Trust Doctrine
- Government-to-government relationship
  - **Nation-to-Nation**
- Historical Context
  - **Military as instrument of oppression**
  - **Native American service**

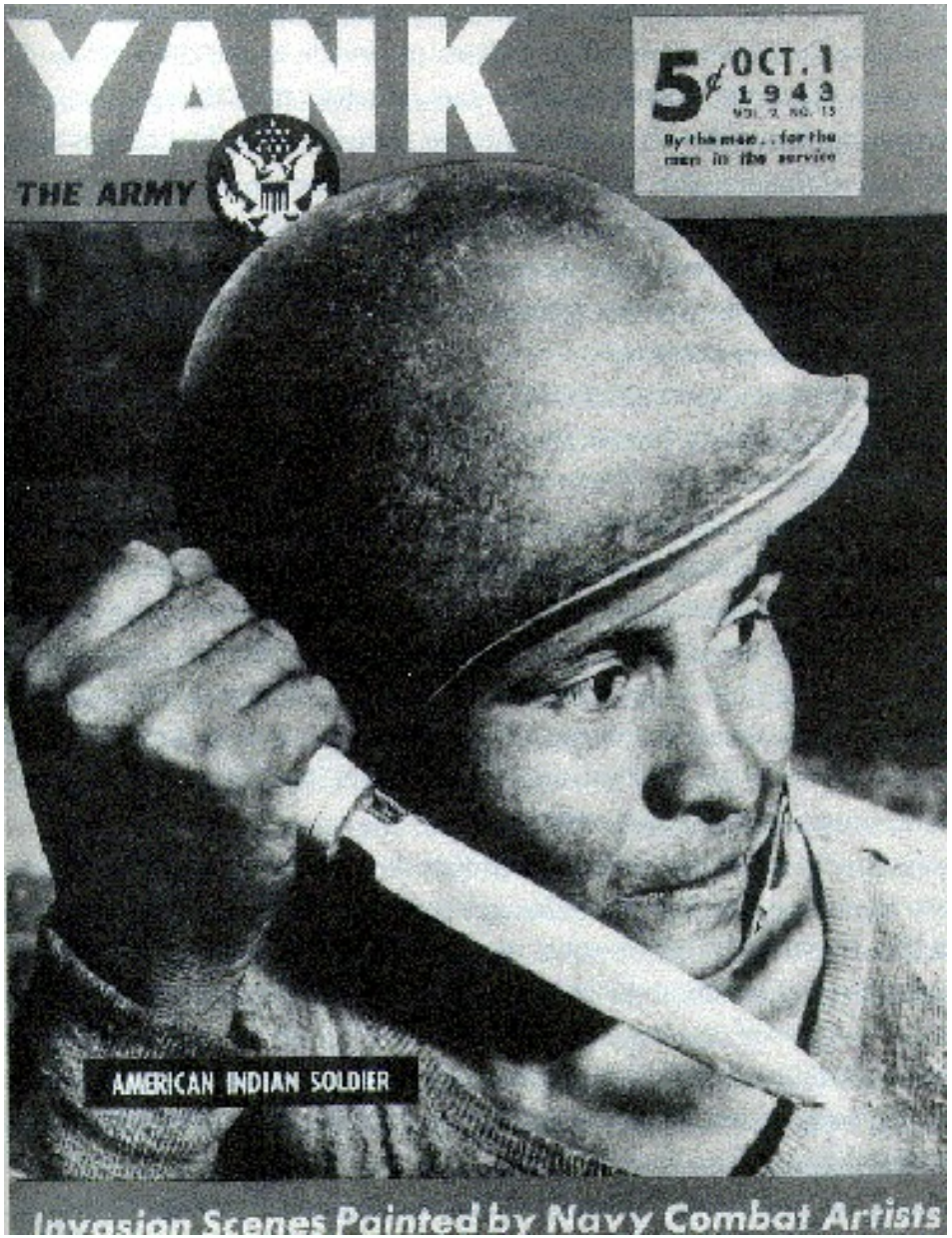


Kiowa Tipi Cover (1800’s): depicting battle between Plains Tribes and US Troops

to flood

for Garrison Dam on Upper Missouri River: 1950’s

Veterans of World War I:
Southern Plains


YANK
THE ARMY
5¢ OCT. 1 1943
By the men . . . for the men in the service
AMERICAN INDIAN SOLDIER
Invasion Scenes Painted by Navy Combat Artists

World War II publicity: "American Indian Soldier"

Ira Hayes, Pima American Indian,

National Historic Preservation Act
Section 101(d)(6) & Section 106

- **<u>Must Consult With Tribes and NHOs</u>: That attach traditional religious importance to a property that may be affected by proposed action:**
  - ***STEP 1: Identify consulting parties***
  - ***STEP 2: Identify and evaluate historic properties***
  - **STEP 3: Assess effects**
  - **STEP 4: Formally consult to resolve adverse affects**
  - **STEP 5: Develop and implement signed MOA**
- **<u>Whom do I consult with</u>?**
  - **Tribal Historic Preservation Officer? (sometimes)**
  - **Head of the Tribal Government? (always)**

EO 13007, “Indian Sacred Sites”

- **Sacred Site:**
  - **–specific, discrete, narrowly delineated location on Federal land;**
  - **–identified by authorized traditional cultural and religious leader of Federally recognized tribe;**
  - **–as significant for use in Indian religion**
- **Requirements:**
  - **–Consult on a government-to-government basis:**
    - **To identify sacred sites on military installations**
    - **To provide reasonable access for ceremonial use**
    - **To discuss actions that may limit access or adversely impact sites**
  - **–Protect the physical integrity of sites to *extent*

Archeological Resources Protection Act

- **Basic requirements:**
  - **Permit: archeological resources cannot be excavated, removed or damaged without a permit issued by the Installation Commander.**
  - **Identify affiliated tribes**
  - **Consult to identify sacred sites**
  - **Notify tribes prior to harming or destroying sacred sites**

Native American Graves Protection and Repatriation Act

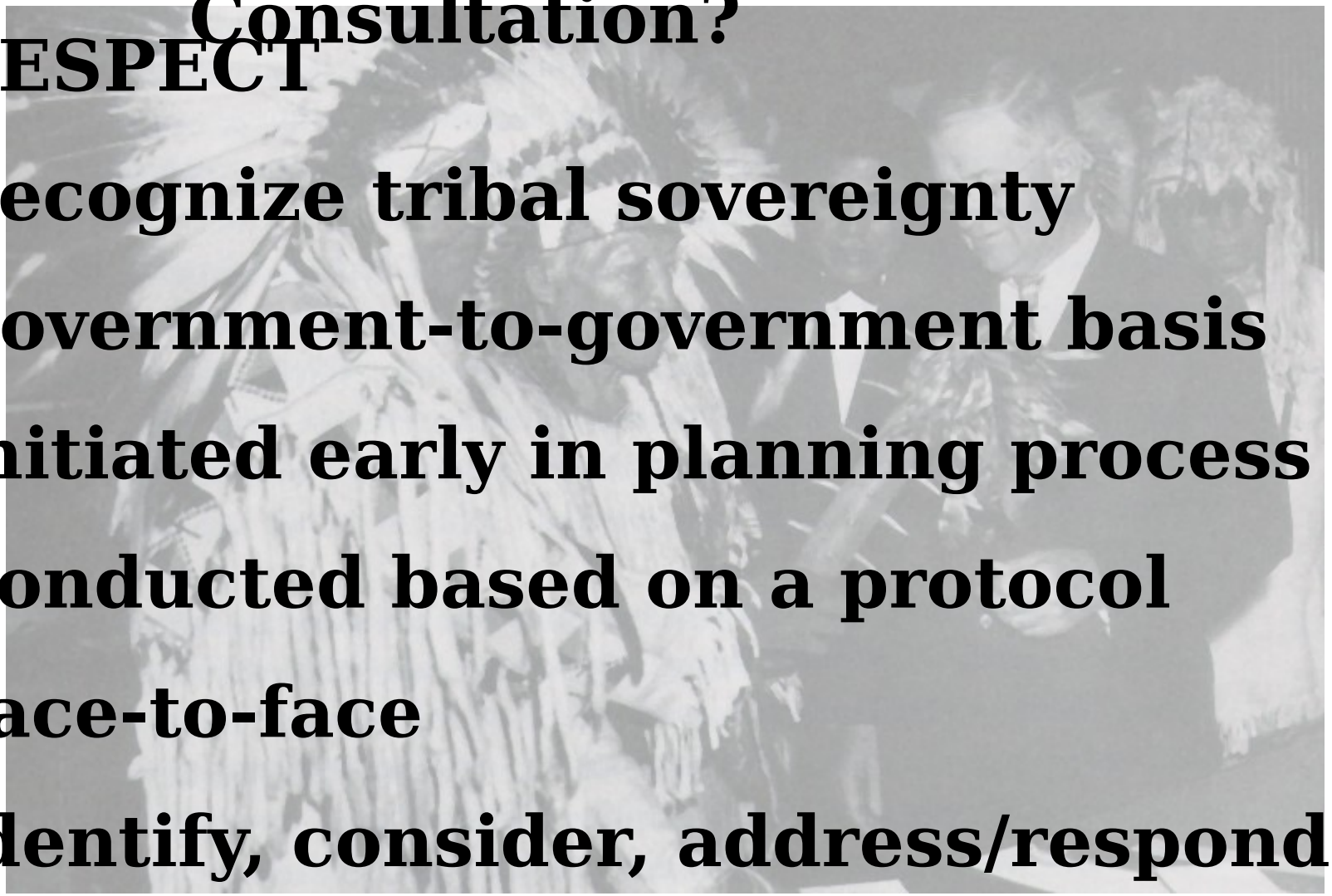
- **Requirements:** all require "consultation" with tribes
  - –**Repatriate:** human remains and cultural items to tribes/NHOs
  - –**Intentional excavation**: prior to intentionally excavating "cultural items"
    - consult with culturally affiliated Indian tribes/NHOs
    - obtain a permit under ARPA
    - return items to appropriate tribes
  - –**Inadvertent discovery:** if "cultural items" inadvertantly discovered:
    - immediately stop work for 30 days
    - notify the Installation Commander

RIGHTS RESERVED

General Tribal Consultation Drivers

- **Presidential Memorandum, *Government-to-Government Relations With Native American Tribal Governments,* April 29, 1994**
- **Executive Order 13084, *Consultation and Coordination with Indian Tribal Governments*, May 14, 1998**
- ***Department of Defense American Indian and Alaskan Native Policy,* 20 October 1998**
  - **–Consultation trigger: actions with the *"potential to significantly affect protected tribal resources, tribal rights, or Indian lands."***

What is Tribal Consultation?



- **RESPECT**
- **Recognize tribal sovereignty**
- **Government-to-government basis**
- **Initiated early in planning process**
- **Conducted based on a protocol**
- **Face-to-face**
- **Identify, consider, address/respond to tribal issues**
- **Outcome "Narrows the Gap"**

Hard Lessons Learned

- **IDENTIFY RECOGNIZED AFFILIATED TRIBES**
  - **Adjacent**
  - **Aboriginal**
- **BEWARE OF "OTHER" GROUPS**
  - **State recognized tribes**
  - **Non-recognized tribes**
  - **Alaskan Village/Regional corporations**
- **INITIATE RELATIONSHIP ON NATION-TO-NATION BASIS**
- **ESTABLISH "CONSULTATION" PROTOCOL**
  - **Address "consultation" triggers**
  - **Prior notification -> no done deals!**
  - **Installation Commander-to- head of tribal government**
  - **Staff-to-staff**
  - **Face-to-face vs. letter/phone call**

Hard Lessons Learned

- **FUNDING**
  - **Tribal staff**
  - **Traditional cultural leaders**
- **RESPECT CONFIDENTIALITY**
  - **FOIA**
  - **ARPA and NHPA exemptions**
- **CONDUCTING CONSULTATION**
  - **Consider doing it on tribal lands**
  - **Establish mutual agenda, but expect to stray**
  - **Facilities: room set-up**
  - **Food: fiscal limitations**
  - **Tribal Invocation**
  - **Listen more than talk (avoid being a lawyer)**
  - **Wear a thick skin (remember history)**
  - **Don’t expect resolution**

Hard Lessons Learned

- **EXPECT FOLLOW-ON REQUESTS**
- **DON’T SECOND GUESS CULTURAL ISSUES**
  - **Sacred Sites**
  - **Traditional Cultural Properties**
- **MAKE SURE IT IS CONSULTATION**
  - **Not just a coordination meeting**
  - **Beware of “representational” groups**
- **DON’T MAKE PROMISES YOU CANNOT KEEP**
  - **Promise to consider issues**
- **KEEP A CONSULTATION RECORD**
  - **Prepare minutes**
  - **Offer tribal review and comment**

References

- **National Historic Preservation Act (NHPA), 16 U.S.C. 470 et seq.**
  - **36 CFR Parts 800; 36 CFR Part 60; 36 CFR Part 63**
- **Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001 et seq.**
  - **43 CFR Part 10**
- **Archeological Resource Protection Act (ARPA), 16 U.S.C. 470aa et seq.**
  - **32 CFR Part 229; 43 CFR Part 7, Subpart B**
- **National Environmental Policy Act (NEPA), 42 U.S.C. 4321 et seq.**
  - **43 CFR Parts 1500-1508**
- **American Indian Religious Freedom Act (AIRFA), 42 U.S.C. 1996**
- **Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a**
  - **65 Fed Reg 49, p. 13298, March 13, 2000; 25 CFR Part 83**
- **Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601-1628**

- **Executive Order 13007, "Indian Sacred Sites," 24 May 1996**
- **Executive Order 13084, "Consultation and Coordination With Indian Tribal Governments," 14 May 1998**
- **Presidential Memorandum, "Government-to-Government Relations With Native American Tribal Governments," 29 April 1994**

- **Department of Defense American Indian and Alaska Native Policy, 20 October 1998**

- **F.S. Cohen, *Handbook of Federal Indian Law* (1982)**